

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.,)	Case No. 05-CV-0329 GKF-SAJ
)	
Plaintiffs,)	<u>DEFENDANTS' REPLY</u>
v.)	<u>MEMORANDUM IN SUPPORT OF</u>
)	<u>JOINT MOTION</u>
)	<u>FOR CLARIFICATION OF</u>
Tyson Foods, Inc., et al.,)	<u>COURT'S OCTOBER 28, 2008 ORDER</u>
)	
Defendants.)	EXPEDITED CONSIDERATION
)	REQUESTED

Plaintiffs' response to Defendants' motion for clarification (Dkt. No. 1799) largely misses the issues critical to the Court's extension of time based on Plaintiffs' experts repeated changes in their reports, and requires a brief reply.

The Court's October 28, 2008 Order (Dkt. No. 1787) extended the main deadline for Defendants' expert reports by some six weeks, based largely on declarations from Defendants' fate-and-transport experts Drs. Bierman and Sullivan detailing how Plaintiffs' experts' errata undercut and delayed both their work and the other defense experts who depend on their results. (See Dkt. Nos. 1759-3, 1759-4, 1767-2, 1767-3.) The Court concluded that:

- Plaintiffs' expert "supplementations are detrimental to the timely resolution of this case,"
- "These delays harm all parties, postponing the date on which either side may receive an ultimate resolution," and
- Defendants "have been addressing a moving target, resulting in a waste of time and resources." (Oct. 28, 2008 Ord. at 4; Dkt. No. 1787.)

The Court concluded that “[t]he most appropriate relief which the court can provide to Defendants is to extend the date on which their expert reports are to be submitted.” (Id.)

The relief the Court articulated, however, is ambiguous and potentially inconsistent with these comments and this conclusion. The Court’s Order granted Defendants’ experts generally a six-week extension from October 15 to December 1, 2008, but omitted any extension for (or any mention of) the defense experts who need it most: the very fate-and-transport experts whose declarations described Plaintiffs’ experts’ supplementations, delays, and resulting prejudice, and whose deadlines already fell after December 1. Defendants believe that this omission is an oversight, and the present motion asks the Court to address this inconsistency. Defendants ask the Court to do what its October 28 comments suggest it originally intended to do: grant the six-week extension to the defense experts whose work was most prejudiced by Plaintiffs’ experts’ errata.

Also, Plaintiffs try to read the Court’s Order as somehow limiting Defendants’ ability to select experts to testify at trial, taking issue in particular with one of Defendants’ fate-and-transport experts: Brian Murphy. Defendants have always made clear that their experts will not necessarily match Plaintiffs’ experts one-for-one, and Defendants’ disclosures to date have plainly stated that Defendants may add experts as the need arises. Plaintiffs do not deny that their own experts address fate-and-transport issues, or that their experts’ belated errata relate mainly to that subject area. Indeed, the Court will recall that the October 8 hearing on the original motion included a lengthy discussion of fate-and-transport as an expert category. Plaintiffs selected their own experts on topics of their choice; they cannot reasonably object when Defendants seek to exercise the same freedom on a schedule compelled by Plaintiffs’ own late supplementations.

Defendants urge the Court to grant their motion and to clarify its Order by adopting the following schedule, which extends each of Defendants' affected liability expert deadlines by the same six weeks the Court has already afforded to the bulk of Defendants' experts:

December 1, 2008	<ul style="list-style-type: none"> ▪ Defendants' expert reports on all issues except damages, unless otherwise noted below
January 23, 2009	<ul style="list-style-type: none"> ▪ Victor Bierman ▪ Modeling and other fate-and-transport experts (includes Brian Murphy in part)
January 26, 2009	<ul style="list-style-type: none"> ▪ Michael McGuire ▪ Drinking water quality ▪ Erosion (includes Wayne Grip in part)
January 30, 2009	<ul style="list-style-type: none"> ▪ Timothy Sullivan ▪ Alex Horne ▪ John Connolly ▪ James Chadwick ▪ Aquatic ecology (includes Tom Ginn in part) ▪ Limnology (includes Tom Ginn in part)
May 30, 2009 ¹	<ul style="list-style-type: none"> ▪ Jim Chadwick ▪ Spring sampling

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¹ This is the existing deadline under the August 8, 2008 Order (Dkt. No. 1756) and is not affected by this motion.

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